

No. 15886

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

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~~MISSISSIPPI TANK & BRIDGE CO., a Corporation,~~

*Appellant,*

*vs.*

~~COUNTY OF ORANGE, a County of the State of California,  
and WILSON H. WARNER,~~

*Appellees.*

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BRIEF FOR APPELLANT.

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FILED

SUP - B 1056

PAUL F. GRANDE, Clerk



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No. 15886

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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DIXIE TANK & BRIDGE Co., a Corporation,

*Appellant,*

*vs.*

COUNTY OF ORANGE, a County of the State of California,  
and WILLIS H. WARNER,

*Appellees.*

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**BRIEF OF APPELLANT.**

---

**Jurisdictional Statement.**

Federal jurisdiction below and on appeal is based on 28 U. S. Code, Sections 1332(a)(1) and 1291, respectively.

Dixie Tank & Bridge Co., plaintiff below, sued the County of Orange and Willis H. Warner, defendants below, for \$7,511.60, due on contracts express or implied, in the U. S. District Court for the Southern District of California. That Court entered final judgment against plaintiff on January 2, 1958, dismissing, upon defendants' motion for judgment on the pleadings, the plaintiff's Second Amended and Supplemental Complaint, without leave to amend; and overruled plaintiff's two motions, (1)

for summary judgment and (2) for judgment on the pleadings. From the judgment Dixie Tank & Bridge Co. appeals. [R. 58-74, 164-167.]

The action is between citizens of different states, appellant being a Tennessee corporation and the appellees being a California county and an individual resident thereof. The matter in controversy exceeds \$3,000.00. [R. 58-59, 74, 92.] Appellant contends the District Court's actions on all three motions were erroneous. [R. 165-168.]

#### Statement of the Case.

Between October 2 and November 21, 1956, Dixie Tank & Bridge Co. ("Dixie" herein), a contractor, furnished the necessary labor and materials and duly performed, to the full satisfaction of the County of Orange, eight separate work projects, each for an agreed separate price. The projects were let to Dixie in three contracts entered into pursuant to competitive bidding. Two of the contracts were signed by the County's Board of Supervisors (called "the Board" herein), and the third by the County's Purchasing Agent acting by express authority of the Board. [R. 59-61, 65-90, 92, 151-154.]

The combined effect of the eight work projects, the agreed price of no single one of which amounted to \$4,000.00, was to completely clean, scale, repair, repaint, and replace or adjust accessory parts on, the County's 100,000-gallon elevated steel water tank at the County General Hospital near Orange, California, for a total of \$7,511.60.

It is agreed in the pleadings that the labor and materials furnished by Dixie in performing the work were of the reasonable worth and value of \$7,511.60, that the reasonable worth and value of such labor and material furnished

for each part of the work equals the agreed price therefor, and that the County has accepted, is using, and intends to keep the product of such work and material without paying Dixie anything whatever therefor. [R. 65, 93, Par. IX and Answer thereto.]

The Board rejected in full Dixie's four verified claims for the work on May 28, 1957. [R. 61, 92, Par. VI and Answer thereto.] Under Government Code, Section 25203, the Board has control of the County's defense in this action.

The Board's defense, asserted in the County's Answer [R. 62-63, 92-93, Par. VII and Answer thereto], is an affirmative defense, to wit, that the Board itself was guilty of statutory misfeasance in allegedly failing to "adopt plans, specifications, strain sheets and working details" for the tank repair work, and in allegedly failing to "cause an advertisement for bids for the performance of the work to be published in a . . . newspaper" before letting the work to Dixie, which adoption and advertisement the Board now claims were necessary to meet requirements for a valid contract under Government Code, Sections 25450, 25451 and 25452.

The two contracts which the Board signed with Dixie covered all eight projects. The Board, acting through its Chairman, appellee Willis H. Warner, who was a member of the Board, signed these contracts after the Board had expressly approved the language thereof by unanimous resolution authorizing the Chairman to sign such contracts on its behalf. Each contract contained a covenant that:

"The party (Mr. Warner) or parties (the Board) signing this contract on behalf of the First Party (the County) covenant and agree that they are fully au-

thorized and empowered to sign, execute and deliver the same, and *that all legal requirements have been fully complied with.*" [R. 64, 68-69, 70-71, 82-83, 88-89, 152-154.] (Explanatory parenthesis inserted.)

Dixie relied on these covenants of legality in performing the contracts, as appears from the affidavit of its president, W. A. Riley. [R. 132.]

In addition to its two contracts with the Board dated October 2 and November 7, 1956, respectively [R. 80-82, 84-89], Dixie was employed to perform the same work for the same prices, *i.e.*, for Dixie's bid prices for the eight projects [R. 77-78], by Purchase Order No. 62659 issued by the Purchasing Agent October 5, 1956, which Purchase Order was amended by Change Order issued by the Purchasing Agent on November 13, 1956. [R. 83-84, 89-90.] The Board's authorizations for all these documents, including the Purchase and Change Orders, appear in the Second Amended and Supplemental Complaint and the appellees' Answer thereto and their admissions made on request. [R. 65-70, Par. X-XI, 93, 151-156.]

The total repair work was naturally and necessarily divided or separated by County officials, and by the Board, into eight work projects, for reasons of economy, and because the extent and kind of welding of seams, rivets and pits that would be required to repair the tank was unknown and could not be ascertained or determined before the tank had been rigged, cleaned, scaled and inspected. [R. 63, 129-130.] The work was not split by the Board for the purpose of evading the competitive bidding statute, but was split in good faith for the above reasons. [R. 63-64, 153-154, Par. VIII (1) and admission 6.]

Because the amount of welding was unknown and unascertainable pending the cleaning, scaling and inspection, Dixie bid unit prices for the three welding items, *i.e.*, 60 cents each for welding all rusted out rivets, and pits in tank plates, and \$3.50 per lineal foot for welding deteriorated seams. Dixie bid flat sums for each of the other five projects. [R. 75-78.] The work done pursuant to this bid and ensuing contracts, therefore, was as follows:

The tank was cleaned and scaled for \$550.00; 3,616 of rusted out rivets were then welded (at 60 cents each) for \$2,169.70; 712 lineal feet of deteriorated seams were welded (at \$3.50 per foot) for \$2,492.00; all loose sway rods were tightened and adjusted for \$150.00; the tank interior was primed and relined for \$650.00; the tank exterior and tower were cleaned, primed and repainted for \$650.00; and catwalk plates were replaced, as needed, for \$850.00. These seven items, or projects, total the \$7,511.60 total price aforesaid. No pits needed welding, so, nothing was due for the other, or eighth project, *i.e.*, to "weld all pits in tank plates that are over halfway through tank plates" at 60 cents each. [R. 60, 66-71, 77-90.]

These eight projects were let to Dixie by the Purchasing Agent and the Board at the separate prices aforesaid as the result of, and pursuant to, actual, bona fide competitive bidding conducted by mailed Requests for Bid circulated by the Purchasing Agent to five qualified bidders, including Dixie, with the approval of the Board. The Board not only adopted the recommendation of its hospital committee that the work be so split and "arranged for" by the Purchasing Agent, but after such splitting and advertising by mail, the Board itself entered into the

two contracts aforesaid with Dixie, paralleling the orders issued by the Purchasing Agent. [R. 63-65, 66-71, 75-90, 92-94, 128-134, 151-155.]

That is, the Board both authorized and ratified all acts of the Purchasing Agent in dealing with the Dixie.

The first of the Board's contracts obligated Dixie to clean, scale, and paint the inside and outside of the tank for \$1850.00, which is the exact total of the figures \$550.00, \$650.00, and \$650.00 at which Dixie had bid to perform the same three projects in its response to the Purchasing Agent's Request for bids. [R. 77-78, 81-82.] In this contract of October 2, 1956, the Board and Dixie agreed that after the cleaning and scaling of the inside of the tank had been done, so as to enable the County and Dixie to determine, by inspection, what rivets and seams needed welding, flat prices would then be reached for the welding before it was done. [R. 82.]

After the cleaning, scaling, and inspection, the County determined that 3,616 rusted out rivets needed welding, which at 60 cents each would amount to \$2169.60, and that 712 lineal feet of deteriorated seams needed welding, which at the agreed \$3.50 per foot, would amount to \$2492.00; and on November 7, 1956, the second and final contract for the work was executed by the Board, including these new items which could not be determined beforehand, and fixing the full cost of all the prospects at \$7511.60. [R. 84-88.]

This total was \$1011.60 more than the \$6,500 the Board had previously authorized the Purchasing Agent to spend; but the Board by resolution added that amount, and the Purchasing Agent issued a Change Order to Dixie to cover. [R. 89-90.]

Dixie thereupon completed all the work and the same was inspected, approved and accepted by the County on November 21, 1956. [R. 90.]

On November 24, 1956, Dixie billed the County for its work as follows [R. 91]:

|   |            |
|---|------------|
| Per Purchase Order No. 62659, Dated October   |            |
| 5, 1956. Scaling, Cleaning and Painting In-   |            |
| terior and Exterior, Labor and Material ..... | \$1,850.00 |
| Welding of 712 feet seams @ 3.50 per lineal   |            |
| foot .....                                    | 2,492.00   |
| Welding of 3616 Rivets @ .60 per rivet .....  | 2,169.60   |
| Tighten and adjust all loose Sway Rods .....  | 150.00     |
| Replace catwalk plates where necessary .....  | 850.00     |
| <hr/>   |            |
| Total .....                                   | \$7,511.60 |

The Board then first advanced the claim that it had acted unlawfully to Dixie's loss. After several months of negotiations with County Counsel and the Board, Dixie on May 18, 1957 filed and presented to the Board its four verified claims for its work and materials on the eight projects; and these the Board rejected on May 28, 1957. [R. 61-62, 92.] Dixie filed suit.

Orange County, California, contains less than 500,000 population. In 1956 its population was 216,224. [R. 151].

#### Contentions of the Parties.

A claim that there was "only one job" for \$7,511.60 and that the Board was guilty of misfeasance in its duties is the County's only defense in this case. [R. 92-94.]

Dixie contends that it engaged in actual, bona fide competitive bidding for eight work projects, and won the faithfully performed all three contracts therefor, and is

justly entitled to payment of the actual and agreed value of its work and materials, whether or not the Board failed to "adopt working details" or to "advertise in a newspaper" (which Dixie does not admit), because:

1. The work was split or divided by the Board into eight work projects, separately priced, each under \$4,000.00, and such splitting was not prohibited, but was impliedly authorized by Government Code, Sections 25351, 25450.5 and 25464; and the contracts for the split work are lawful, since Orange County's population in 1956 was under 500,000, and was in fact 216,224.

2. The County is estopped by the Board's covenants to claim or prove the Board's self-claimed derelictions of duty.

3. The eight work projects were adopted by the Board through Requisition M2946 A and the Purchasing Agent's Request for Bid, and are legally sufficient "working details"; and the Board's asserted failure to make full newspaper advertising for bids, even if proved, would show at most a mere "irregularity or invalidity in the exercise of a general power to contract"; hence the County is "responsible on implied contract for the payment of benefits it receives under an illegal express contract not prohibited by law."

4. And, if the County should escape liability because all legal requirements had not been fully complied with by the Board, Mr. Warner as member of the Board and as signer of the covenants, is liable to Dixie on the covenants.

Dixie also contends that the District Court, regardless of the law otherwise applicable in the case, improperly sustained the defendants' motion for judgment on the pleadings, because there was a genuine issue on the

face of the pleadings as to whether the Board had or had not adopted plans and/or advertised for bids in a newspaper. [R. 156.] Dixie further contends that it was entitled, on its own motions, to summary judgment against the County and/or Mr. Warner under the pleadings and admissions of record.

### Judgment Below.

In deciding the motions, the District Court said [R. 165-166]:

“Now, Therefore, it appearing to the Court on the face of the pleadings:

“That the contract on which suit is attempted to be brought violates the provisions of Sections 25450, 25451 and 25452 of the California Government Code. Recovery cannot be had upon any theory of implied contract, estoppel or on a quantum meruit, or against the Chairman of the Board of Supervisors personally. (Miller v. McKinnon, 1942, 20 C. 2d 83; County of San Diego v. California Water and Telephone Company, 1947, 30 C. 2d 817.)

“That even assuming that the present provision of Section 25450.5 of the California Government Code allows, by implication, the splitting of contracts in counties having less than 900,000 population, the fact is that in this case there was no such splitting. The plaintiff cannot by treating the various types of work and the purchase orders for them as separate contracts, avoid the consequences of the provisions of the California statute which makes the letting of such a contract, without advertisement and without specifications, void.

“The final contract entered into dated November 7, 1956, called for the work as a whole to be completed at the price of \$7,511.60.

“It Is Ordered for the reasons above stated and pursuant to Rule 12(c) of the Federal Rules of Civil Procedure that judgment be entered in favor of the Defendants and against the Plaintiff. That plaintiff take nothing against the Defendants or either or any of them by said Complaint and that the Complaint be and the same is hereby dismissed with costs to the defendants.”

#### Assignments of Error.

1. The Court erred in granting defendants' motion for judgment on the pleadings.
2. The Court erred in overruling and failing to grant plaintiff's motion for judgment on the pleadings in its favor.
3. The Court erred in overruling and failing to grant plaintiff's motion for summary judgment against the defendants.

#### Statutes and Rules Involved.

1. Civil Code of California, Sections 1641, 1642, 1643, 1644, 1649, and 1650.
2. Government Code of California, Sections 23004(c), 23005, 25021, 25351, and 25450 to 25466, inclusive. [See Sections copied in R. 117-124.]
3. Former Political Code of California, Section 4041.18, repealed in 1947. [See R. 113-116 and Distribution Table into Government Code, R. 126-127.]
4. Federal Rules of Civil Procedure, Rules 12(c), 41(b), 52(a), 56(c), and 75(e).
5. Local Rules, U. S. District Court, Southern District of California, Rules 3(d)(2) and 4(d).

The Civil Code sections cited above provide, in substance, that a contract is to be construed as a whole and so as to give effect to every part; that several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together and "receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties"; that words are to be understood in their ordinary and popular sense and interpreted in the sense in which the promisor believed that the promisee understood them; and that particular clauses are subordinate to the general intent of the contract. (Secs. 1641-1644, 1649, 1650.)

In 1956, the pertinent provisions of the Government Code sections cited above [see R. 117-124], were as follows:

Sections 23004(c), 23005, 25021:

"‘A county may \* \* \* make contracts’; and ‘may exercise its powers only through the board of supervisors or through agents and officers acting under the authority of the board’; and ‘the chairman of the board shall perform such duties as are prescribed by law or by the board.’”

Section 25351:

“The board may \* \* \* repair buildings for a hospital.”

Sections 25450-25466 (Construction, Alteration and Repair of Buildings) as follows:

“Whenever the estimated cost of construction \* \* \* or the cost of any repairs (to any hospital or other public building) exceeds the sum of four

thousands dollars (\$4,000) \* \* \* the work shall be done by contract. Any such contract not let pursuant to this article is void." (Sec. 25450.)

"In any county containing a population of *500,000 or over*, it is unlawful to split or separate into smaller work orders or projects any public work project for the purpose of evading the provisions of this article requiring public work to be done by contract after competitive bidding." (Sec. 25450.5.)

"The board \* \* \* shall adopt plans, specifications, strain sheets and working details for the work." (Sec. 25451.) "The board shall cause advertisement for bids for \* \* \* the work to be published \* \* \* in a \* \* \* newspaper." (Sec. 25452.) "All bidders shall be afforded opportunity to examine the plans, specifications, strain sheets and working details." (Sec. 25453.) "The board shall award the contract to the lowest responsible bidder." (Sec. 25454.)

"In counties employing a purchasing agent, \* \* \* materials and supplies used in the \* \* \* repair of any works mentioned in Sec. 25450 costing not more than two thousand dollars (\$2,000) may be purchased by the purchasing agent \* \* \* without the formality of obtaining bids, letting contracts, preparing specifications and other things required by this article for purchases costing more than two thousand dollars (\$2,000)." (Sec. 25457.) (By Stats. 1957 ch. 1719, Sec. 1, this Sec. 25457 was amended to authorize "employment of independent contractors used in" the repair of such works, by the purchasing agent.)

"The method of payment for construction contracts shall be determined by the board \* \* \*." (Sec. 25464.)

Former Political Code, Section 4041.18 [R. 113-116] provided, in pertinent part as follows:

“Under such limitations and restrictions as are prescribed by law \* \* \* the board \* \* \* shall have the *jurisdiction and power* to \* \* \* repair hospital \* \* \* and other public buildings. \* \* \* Wherever \* \* \* the cost of any repairs (to any hospital or other public buildings) shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided.”

Section 4041.18 also directed the adoption of plans and newspaper advertising for bids, and authorized purchases by purchasing agents up to \$2,000, in substantially the same terms as were used in 1956 Government Code, Sections 25451, 25452, 25453 and 25454.

Federal Rules of Civil Procedure, Rule 12(c), authorizes judgment on the *pleadings only*, excluding “matters outside the pleadings.” Rules 41(b), 52(a), and 56(c), govern motions for summary judgment, and authorize such a judgment on “the pleadings \* \* \* and admissions on file, together with the affidavits, if any,” where there is no genuine issue as to any material fact, but they appear to require the Court to make findings of fact when, on such a motion, judgment is rendered against the plaintiff.

Federal Rules of Civil Procedure, Rule 75(e), requires abbreviation of the record on appeal by eliminating all but one copy of any document and by abridging and omitting irrelevant portions of all document, and excluding “all matter not essential to the decision of the decision of the questions presented by the appeal”; and

provides sanctions to discourage excessive designations of non-essential matter.

Local Rule 4(d) requires that an amended pleading "must be retyped and filed so that it will be complete in itself, including exhibits, without reference to the superseded pleading."

Local Rule 3(d)(2) requires a party to serve and file with his motion for summary judgment, "proposed findings of fact and conclusions of law and proposed summary judgment," which appellant did in this case. [R. 135-151.]

#### Statement as to the Record.

The printed Transcript of Record is replete with unusual contents. Surprisingly, upon designation by the appellees, it contains [R. 99-127] a brief filed by appellant below, which brief includes, as Appendices A, B and D thereto, copies of all pertinent parts of former Political Code, Section 4041.18 and of Government Code, Sections 25351, and 25450 through 25466, inclusive (cited above), and a Table of Distribution tracing the transition of clauses from one code to the other. Also, but not so fortunately, upon designation by the appellees, the Transcript of Record contains [R. 3-66] all the pleadings and motions filed before Dixie's Second Amended and Supplemental Complaint. This complaint, pursuant to Local Rule 4(d), was complete in itself, including exhibits, and it superseded all prior pleadings, motions, etc.

These designations by appellees were excessive, and violated the record abbreviation provisions of Federal Rules of Civil Procedure, Rule 75(e), in that the result is an inflated, punitory record, full of confusing and use-

less duplications of superseded documents and arguments of counsel, *i.e.*, full of matter which is neither essential nor pertinent to the decision of any question on this appeal. Specifically, pages 3 through 54 and pages 99 through 127 (total, 81 pages) of the 170 page printed transcript, contain nothing but useless matter. This is the exclusive fault of the appellees, as a comparison of the designations of the record by the parties below and here will clearly show. These designations are in the clerk's office. Only pages 56 through 95 and pages 127 through 170 (total 82 pages) are pertinent in any way to the decision on this appeal.

Sanctions ought to be applied to the appellees on account of these excessive designations.

However, this excessive matter does contain copies of the statutes above cited; and Dixie asks to be relieved of the burden and added cost of reproducing these statutes again in an appendix to this brief.

The proposed findings of fact and proposed judgment [R. 136-151, total 15 pages] were necessarily filed below under Local Rule 3(d)(2) as a part of, and with, Dixie's motion for summary judgment [R. 135-136], and are therefore a part of the moving papers which show the District Court's error in not granting plaintiff's motion for summary judgment.

## ARGUMENT.

### SUMMARY.

The District Court wholly misconstrued, and erroneously voided, the Final Contract dated November 7, 1956. By its express terms, this was a “merged” or consolidated, final contract; and is to be taken and read with the Board’s prior contract of October 2, 1956, the Purchasing Agent’s purchase order of October 5, 1956, and the requisition and bid on which it was based. These documents, and the facts pleaded and admitted, prove beyond all doubt that the work was intentionally split and let by the County in eight separate projects, each for a separate agreed price; and that the various projects were united in the final contract for the sole purpose of establishing by agreement the total sum due for all the various projects separately priced and performed by Dixie.

The splitting was entirely lawful under Government Code, Sections 25351, 25450.5 and 25464, since Orange County did not have a population exceeding 500,000, and none of the split projects exceeded \$4000.00.

The splitting being lawful, the mere fact that the eight projects were let in three contracts, later merged into one to establish an agreed total, rather than in eight separate contracts, is immaterial, and does not render the splitting illegal or nugatory.

The District Court’s view that the work could not be split by “treating the various types of work and the purchase orders for them” as separate projects for separate prices is error. The language of the statute (Govt. Code, Sec. 25450.5) contemplates that the Board may “split or separate into smaller work orders or projects

any public work project.” What more logical method for splitting “into smaller work orders or projects” could there be than by dividing the work by “the various types of work” at separate prices?

Actually, the District Court imposed here a “no splitting” rule of its own, in the face of the authority for splitting inherent in the statute under the rule *expressio unius est exclusio alterius*.

The District Court erroneously voided the express covenants of full legal compliance, made by the Board and Mr. Warner, whose duties it was to adopt plans, etc. and advertise in a newspaper, if that were necessary. The County is estopped by this covenant; or else, Mr. Warner is, and ought to be, liable personally thereon. The court’s view unprecedently expands the derivative immunity of public officials from liability for their own misfeasance, to include immunity even where they have covenanted personally that they have already properly performed acts subsequently shown, or claimed, to have been omitted by them.

The face of the pleadings did not justify judgment for defendants thereon; but did justify judgment thereon for plaintiff under the doctrines of estoppel and implied contract. (Fed. Rules Civ. Proc., Rule 12(c).) And, certainly, under Federal Rules of Civil Procedure, Rule 56(c), plaintiff was entitled to summary judgment against one or the other of the defendants on the undisputed facts.

I.

The Contracts Are Valid.

1. In the absence of some *specific* charter or statutory provision, municipal contracts need not be let under competitive bidding.

*Davis v. City of Santa Ana*, 108 Cal. App. 2d 669, 239 P. 2d 656 (1952);

*Swanton v. Corby*, 38 Cal. App. 2d 227, 100 P. 2d 1077 (1940).

2. There is no *specific* provision in the present county public works act which forbids a county containing *less than 500,000 population* to split a public work into smaller work orders or projects, and avoid the requirements of competitive bidding. The only prohibition on this subject is that in *Government Code*, Section 25450.5, against evasive splitting in the larger counties. In view of this expressly limited prohibition, under the rule of *expressio unius est exclusio alterius*, such splitting is permitted in the smaller counties.

23 Cal. Jur. 741, Sec. 118, n. 20;

*Smith v. Eureka Flour Mills Co.*, 6 Cal. 1, 7 (1856).

Indeed, the Government Code now gives county boards of supervisors general, *plenary* power to make contracts for the repair of hospital and other public buildings, and to determine the method of payment therefor, unrestricted to any particular mode of contracting. This includes discretion to split a public work into smaller work orders or projects, as conferred by the express, limited, prohibition.

*Govt. Code*, Secs. 23004(c), 25351, 25450.5, 25464.

3. It is true that on the ground of "public policy," the court in *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, 140 A. L. R. 570 (1942), inferred a ban on all splitting under the former act. (Pol. Code, Sec. 4051.18, which act was itself wholly silent on the subject of splitting.) However, the legislature has now expressly determined the limits of the prohibition against splitting, and thereby has fixed the state's public policy on the subject, in *Government Code*, Section 2450.5. No judicial extension of the prohibition is warranted.

50 *Am. Jur.* 214-216, Sec. 229.

4. Where a statute enumerates things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned.

*Shelby v. Southern Pacific Co.*, 68 Cal. App. 2d 594, 157 P. 2d 442, 445 (1945).

5. Primarily, it is for the legislature to determine the public policy of the state, not the courts.

*Building Service Employees Int. Union, Local 262 v. Gazzam*, 339 U. S. 532, 536, 70 S. Ct. 784, 787, 94 L. Ed. 1045 (1949);

*Safeway Stores v. Retail Clerks Int. Ass'n*, 41 Cal. 2d 567, 261 P. 2d 721 (1953).

The paramount public policy is that freedom to contract is not to be interfered with lightly. It is the court's duty to sustain the legality of a contract, in whole or in part, if it can do so.

*Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 43 A. S. R. 134, 32 L. R. A. 574 (1894);

*Andrews v. Horton*, 8 Cal. App. 2d 40, 47 P. 2d 496 (1935);

12 *Am. Jur.* 670-671, Sec. 172.

6. As no specific provision of law, and hence no public policy, was violated by the letting by Orange County of eight split work projects, each for a separate price under \$4,000.00 (whether with or without plans or newspaper advertising), the tank work contracts were valid. This is certainly true as to the contracts of October 2 and 5, 1956 [Exs. D and E to complaint] which, with welding expressly excluded as provided in Exhibit D, Section 2 [R. 82], covered only \$2,850.00 of work. The argument as to invalidity is pertinent *only* to the Final Contract, that of November 7, 1956, which included the welding projects.

7. The Final Contract "merges" into itself the prior contracts [R. 85], and as so merged, supersedes the others; hence all the contracts, and explanatory documents, are to be "taken together" as a whole, and interpreted so as to make the whole agreement legal and operative, rather than unlawful and void, and in the sense Dixie understood and the parties intended, subordinating particular clauses to the general intent and giving effect to every part of the whole agreement.

*Civ. Code*, Secs. 1641, 1642, 1643, 1644, 1649, and 1650;

12 *Cal. Jur.* 2d 333-334, Sec. 123.

So taken and interpreted, all the contracts are valid.

8. The intention of the parties is to be sought and given effect, in any contract. If the Final Contract were void, it cannot be assumed that, by the "merger" clause, the parties intended to render invalid the prior valid contracts totaling \$2,850.00. In any event, Dixie would be entitled to that.

9. The county itself is liable for interest from November 24, 1956, under the amended statute covering interest.

*Civ. Code*, Sec. 3287.

## II.

### The County Is Estopped to Claim the Law Was Violated.

1. The Orange County Board of Supervisors had the power and discretion to determine the method of payment, and to split and let the tank work, with or without statutory competitive bidding. It had the legal power and the duty to adopt plans and working details and to advertise for bids, if it should decide to *let the work without splitting*: and it had the power to reject all bids, and do the work by day's work, if the bids submitted were too high. Finally, and in any event, it had the legal power and duty to determine for itself whether it had met all its precedent legal duties, and, based on its determination thereof, to let the contract, or contracts, for the work. Also, it has control of the County's defense in the case.

*Govt. Code*, Sections:

1st sentence: 25464, 25450, 25450.5;

2nd sentence: 25451, 25452, 25456;

3rd sentence: 23004(c), 23005, 25351;

4th sentence: 25021.

2. Because of its broad powers to determine and act in these matters, and because it would be extremely difficult or impossible for an outsider to ascertain the facts, or the purposes, of the Board with certainty by inquiry, the county is estopped by the affirmative representation by the Board that all legal requirements had been fully complied.

*Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 19 S. Ct. 390, 43 L. Ed. 689 (1899).

3. The covenants of full legal compliance, made by the Board Chairman in executing the contracts of October 2, 1956 and November 7, 1956, were representations of the Board, because the Board had expressly authorized the chairman to sign, on its behalf, these specific contracts containing these specific warranties. [R. 154.]

*Eyer (Geo. H.) & Co. v. Mercer County*, 292 Fed. 292 (D. C. Ky. 1923) aff'd 1 F. 2d 609.

4. The county is therefore estopped to claim the contracts are void for the Board's alleged misfeasance in failing to advertise for bids in a newspaper or to adopt working details.

*Gunnison County v. E. H. Rollins & Sons, supra.*

### III.

#### The County Is Liable on Implied Contract.

1. Under the rule in *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, 140 A. L. R. 570, a county is liable on implied contract for the value of benefits received under an illegal express contract where—

(a) The Board of supervisors is given general power to contract with reference to the subject matter of the express contract;

(b) The manner of entering into the express contract, although irregular, was not violative of specific statutory restriction on the general power, nor of public policy.

As shown above, all these conditions are met, in view of the new provisions of the Government Code which did not appear in the Political Code.

*Govt. Code*, Secs. 25351, 25450, 25450.5, 25464, and 23004(c);

*Pol. Code*, Sec. 4041.18 [R. 113-116];

*Gamewell Co. v. City of Phoenix*, 216 F. 2d 928 (C. A. 9, 1954).

2. Deficient advertising for bids is a mere irregularity permitting recover for the value of benefits received.

*McCormick Lumber Co. v. Highland School District*, 26 Cal. App. 641, 147 Pac. 1183 (1915).

(This opinion was distinguished, not overruled, in *Miller v. McKinnon*, and is now a precedent of full vigor.)

3. Plans and working details, which cannot be determined in advance, or would be of no practical value, are not required. (The eight separate work items listed in Requisition M 2946A [R. 75-78], were sufficient as plans and working details for the letting in this case.)

*City Street Improvement Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933 (1910);

35 Cal. Jur. 2d 271, Sec. 478.

4. Since bids from five qualified persons were solicited, and there was *bona fide* competitive bidding, the alleged irregularities in this case were not so grave as to bar relief on implied contract; and, indeed, in view of the broad new discretionary powers of the Board, there has never been a reported case in California under which a plaintiff would be denied relief against a county on the facts of this case.

IV.

Defendant Warner Is Alternatively Liable for Breach of Covenant.

1. An agent who expressly warrants the capacity of his principal to enter into a contract is liable for breach thereof. (Here an express covenant is pleaded.)

*Restatement of Agency*, Sec. 332, Comment C;  
2 Am. Jur. 250, Sec. 318, n. 6;

*Bear River Sand & Gravel Co. v. Placer County*,  
118 Cal. App. 2d 684, 258 P. 2d 543.

V.

Judgment for Defendants Was Premature, Under F.R.C.P. Rule 12(c); Plaintiff's Motions for Judgment Should Have Been Granted.

1. Judgment on the pleadings for plaintiff was unauthorized, because the Court had to, and did consider matters outside the pleadings—to wit, whether plans had been adopted and newspaper advertisement made.

*F.R.C.P.* Rule 12(c);

*Chappell v. Johnson Lumber Co.*, 216 F. 2d 873 (C. A. 9, 1954).

2. Upon estoppel from the pleaded facts, plaintiff was entitled to judgment in its favor on the pleadings; and since there is no genuine issue as to any material fact as to which defendants are not estopped, plaintiff was entitled to summary judgment against one or the other defendant.

*F.R.C.P.* Rules 12(c) and 56(c).

**Conclusion.**

The judgment should be set aside and judgment rendered here, or ordered rendered blow, in favor of plaintiff for \$7,511.60 plus interest from November 24, 1956 against one or the other appellee.

Respectfully submitted,

JAMES C. R. McCALL,

*Attorney for Appellant.*



## APPENDIX.

### Admission of Exhibits, Etc.

Appellant's motion for judgment on the pleadings was based on the Second Amended and Supplemental Complaint and Exhibits A to I thereto attached, and the appellee's Answer thereto and their admissions of record in response to appellant's requests, as appears from the notice of motion; and these were considered by the Court on said motion. [R. 127-128, 58-91, 92-94, 151-156.]

Appellant's motion for summary judgment was based on all the above documents, together with the affidavit of W. A. Riley, and appellant's proposed findings of fact and conclusions of law and proposed summary judgment, as appears from the notice of motion; and all these, with the appellee's Statement of Genuine Issues (filed in opposition), were considered by the Court on said motion. [R. 135-136, 137-140, 150-151, 156-157 and 128-135.]

